TNB Engineering and Consultancy Sdn Bhd & Anor v Boccard Oil & Gas Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–129 OF 2006

GOPAL SRI RAM, ZULKEFLI AND RAUS SHARIF JJCA

8 OCTOBER 2007

Arbitration — Agreement — Jurisdiction of court — Inconsistent clauses — Whether court and not arbitration had exclusive jurisdiction to hear and determine all actions and proceedings arising out of sub-subcontracts

Arbitration — Procedure — Step in proceedings — Dispute on sub-subcontracts — Arbitration proceedings would deprive plaintiffs of right to institute third party proceedings for indemnity — Whether defendant's claim should be heard in main action between plaintiff and third party

Civil Procedure — Parties — Joinder of parties — Dispute between plaintiff and third party over sub-contract — Defendant was sub-subcontractor of plaintiff — Duplicity of proceedings if defendant allowed to proceed with arbitration proceedings against plaintiff — Whether defendant should be brought into plaintiff's action with third party instead

TBV Power (M) Sdn Bhd ('TBV') was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (Units 5 and 6) for Tenaga Nasional Bhd ('the project') and comprising 2 x 500 MW turbine generator units complete with all auxiliary equipment and materials ('the main contract works'). In line with the appointment of TBV as the contractor for the project, the plaintiffs and TBV entered into two sub-contracts both dated 20 September 1996 whereby the plaintiffs agreed to design, fabricate and deliver Low Pressure Fabricated Pipe and Low Pressure Pipe Supports ('the pipes') for the project ('the sub-contracts'). Thereafter, the plaintiffs and the defendant entered into sub-subcontracts issued on 22 January 1997 and 29 January 1997, whereby the defendant agreed to design, fabricate and deliver the pipes for the project ('the sub-subcontracts'). A dispute arose between the plaintiffs and the defendant in respect of the sub-subcontracts and the defendant referred the dispute to arbitration pursuant to the terms of the sub-subcontracts. The plaintiffs and TBV had entered into a settlement agreement

('the settlement agreement') in respect of the sums due under the sub-contracts entered into between the plaintiffs and TBV. There subsequently arose a dispute in regard to the settlement agreement in respect of which the plaintiffs initiated Civil Suit No D3–22–66–2005 ('the D3 action') against TBV. The defendant was not a party to the settlement agreement. The plaintiffs subsequently filed an originating summons seeking inter alia, a declaration that: (1) any dispute between the plaintiffs and the defendant in respect of the sub-subcontracts should be dealt with by the courts of Malaysia; and (2) the appointment of the arbitrators by the defendant pursuant to cl 40 of the sub-subcontracts was invalid. The plaintiffs' originating summons was heard and dismissed by the High Court and the plaintiffs appealed. It was the contention of the plaintiffs that: (1) the dispute between the plaintiffs and the defendant should not be referred to arbitration as there was a conflict between the provisions of cll 40 and 41 of the sub-subcontracts which result in the courts of Malaysia having exclusive jurisdiction to hear and determine all actions arising from the sub-subcontracts; (2) the agreement entered into between the plaintiffs and TBV, a third party precluded the defendant from exercising its contractual rights to refer the dispute between the plaintiffs and the defendant to arbitration; and (3) the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and TBV, the third party.

Held, allowing the appeal:

(1) The plaintiffs ought to bring in the defendant into the D3 action to indemnify themselves. In the D3 action instituted by the plaintiffs against TBV, it was the contention of TBV that the plaintiffs had failed to take the necessary steps to comply with the terms of the contract ('the sub-contracts) and that the plaintiffs failed to supervise the progress of works carried out by the sub-subcontractors to ensure that the works were completed by the sub-subcontractors within the agreed stipulated period. By reason of the plaintiffs' failure, TBV had alleged that it had suffered loss and damage. On this point, the party who would be in the best position to explain these allegations by TBV and being the party who did the works for the plaintiffs and possessed all the relevant records and documents of the same, would be the defendant (see para 9).

(2) It was noted also under para 11 of the defence of TBV in the D3 action, TBV contended inter alia that if the plaintiffs failed to obtain the assistance of TBV to defend the claim instituted by the defendant, TBV would not be obliged to make payments to the plaintiffs for any award or judgment which the defendant may obtain against the plaintiffs.

A On this point unless the plaintiffs could bring the defendant as a party to the D3 action, or manages to consolidate its action with the action against TBV, the plaintiffs would be prejudiced (see para 11).

(3) There is no provision under the Arbitration Act 1952 for the plaintiffs to join TBV and/or the directors of TBV (the defendants in the D3 action) for an indemnity against the defendants' claim against the plaintiffs under the sub-subcontracts. The hearing of the defendants' claim under the sub-subcontracts against the plaintiffs in the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV and/or the directors of TBV to indemnify them (the plaintiffs) against the defendants' claim against the plaintiffs under the sub-subcontracts. The hearing of the defendant's claim under the sub-subcontracts against the plaintiffs in the arbitration proceedings would result in duplicity of proceedings. The dispute between the plaintiffs and the defendant was whether the plaintiffs owe the defendant any sums of money and if so, the amount. This dispute was in fact an integral part of the dispute between the plaintiffs and TBV (see para 14).

(4) The sub-subcontracts cannot be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular, TBV. The sub-subcontracts must necessarily be subject to the sub-contracts between the plaintiffs and TBV. Therefore the plaintiffs were justified in invoking the provision of O 4 r 1(1) of the Rules of the High Court 1980 (see para 15).

(5) On 25 March 2005, TBV (the defendant in the D3 action) had filed an application for stay of proceedings in the D3 action under s 6 of the Arbitration Act 1952 ('application for stay'). In the application for stay, TBV relied on cl 40 of the sub-contracts entered into between the plaintiffs and TBV which provided for reference of disputes and differences between the plaintiffs and TBV to arbitration. Clauses 40 and 41 in the sub-contracts between the plaintiffs and TBV were identical to cll 40 and 41 in the sub-subcontracts between the plaintiffs and the defendant in the originating summons. In the D3 action, the High Court had on 17 August 2005 dismissed the application by TBV for stay of proceedings. In the circumstances the dispute between the plaintiffs an TBV under the sub-contracts and/or the disputes between the plaintiffs and TBV and the directors of TBV under the settlement agreement would be resolved in a trial before the High Court in the D3 action (see para 16).

(6) The common cll 40 and 41 of the sub-contracts and the sub-subcontracts when read as a whole and in their proper construction would show that under cl 41 of each of the sub-subcontracts it is the court which has the exclusive jurisdiction to hear and determine all

actions and proceedings which arise out of the sub-subcontracts. The provision of cl 40 relating to arbitration in the relevant sub-subcontract contradicts and is inconsistent with the cl 41 of each of the sub-subcontract, so much so that the court ought not give effect to the same. Such disputes as exist between the parties should be decided by the court (see para 17).

[Bahasa Malaysia summary

TBV Power (M) Sdn Bhd ('TBV') merupakan kontraktor untuk kerja-kerja bekalan dan pemasangan untuk fasa ketiga bekalkan dan memasang Stesyen Janakuasa-Fasa 3 Unit 5 dan 6) Sultan Salehuddin Abdul Aziz untuk Tenaga Nasional Bhd ('projek tersebut') dan mempunyai 2 x 500 MW turbin pengeluar tenaga elektrik lengkap dengan semua pelengkapan dan bahan-bahan tambahan ('kerja-kerja kontraktor utama'). Sejajar dengan pelantikan TBV sebagai kontraktor untuk projek tersebut, plaintif-plaintif dan TBV telah memasuki du sub-kontrak kedua-duanya bertarikh 20 September 1996 di mana plaintif-plaintif bersetuju untuk mereka, memasang dan menghantar Paip Pemasangan Tekanan Rendah dan Paip Sokongan Tekanan Rendah ('paip tersebut') untuk projek tersebut ('sub-kontrak tersebut'). Berikutan itu, plaintif-plaintif dan defendan telah memasuki sub-subkontrak bertarikh 22 Januari 1997 dan 29 Januari 1997, di mana defendan bersetuju untuk mereka, memasang dan menghantar paip tersebut untuk projek tersebut ('sub-subkontrak tersebut'). Satu pertikaian timbul antara plaintif-plaintif dan defendan berkaitan sub-subkontrak dan defendan merujuk pertikaian tersebut kepada timbangtara menurut terma sub-subkontrak tersebut. Plaintif-plaintif dan TBV telah memasuki satu perjanjian penyelesaian ('perjanjian penyelesaian tersebut') berkaitan jumlah yang terhutang di bawah sub-kontrak yang dimasuki antara plaintif-plaintif dan TBV. Selepas itu timbul satu pertikaian berkaitan perjanjian penyelesaian tersebtu di mana plaintif-plaintif telah memulakan Guaman Sivil No D3–22–66–2005 ('tindakan D3') terhadap TBC. Defendan bukan suatu pihak kepada perjanjian penyelesaian tersebut. Plaintif-plaintif berikutan itu telah memfailkan satu saman pemula memohon antara lain satu deklarasi bahawa (1) apa-apa pertikaian antara plaintif-plaintif dan defendan berkaitan sub-subkontrak tersebut hendaklah dikendalikan oleh mahkamah Malaysia; dan (2) pelantikan penimbangtara oleh defendan menurut fasal 40 kepada sub-subkontrak adalah tidak sah. Saman pemula plaintif-plaintif telah didengar dan ditolak oleh Mahkamah Tinggi dan plaintif-plaintif telah merayu. Adalah hujah plaintif-plaintif bahawa: (1) pertikaian antara plaintif-plaintif dan defendan tidak patut dirujuk kepada timbangtara kerana terdapat konflik antara peruntukan fasal 40 dan 41 sub-subkontrak yang memberikan mahkamah Malaysia mempunyai bidang kuasa eksklusif untuk mendengar dan menentukan semua tindakan yang timbul daripada

A sub-subkontrak tersebut; (2) perjanjian yang dimasuki antara plaintif-plaintif dan TBV, pihak ketiga menghalang defendan daripada menggunakan hak-hak kontraktualnya untuk merujuk pertikaian antara plaintif-plaintif dan defendan kepada timbangtara; dan (3) pertikaian antara plaintif-plaintif dan defendan hendaklah digabungkan dengan pertikaian yang berasingan B dan berbeza antara plaintif-plaintif dan TBV, pihak ketiga.

Diputuskan, membenarkan rayuan:

C (1) Plaintif-plaintif sepatutnya telah memasukkan defendan dalam tindakan D3 untuk melindungi diri mereka. Dalam tindakan D3 yang dimulakan oleh plaintif-plaintif terhadap TBV, adalah hujah TBV bahawa plaintif-plaintif telah gagal untuk mengambil langkah-langkah yang sewajarnya untuk mematuhi terma-terma kontrak ('sub-kontrak D tersebut') dan bahawa plaintif-plaintif telah gagal untuk mengawasi perkembangan projek yang dijalankan oleh sub-subkontraktor bagi memastikan bahawa kerja-kerja tersebut disiapkan oleh sub-subkontraktor dalam tempoh yang ditetapkan dan dipersetujui. Oleh kerana kegagalan plaintif-plaintif, TBV mengatakan bahawa ia E telah mengalami kerugian dan kerosakan. Berhubung perkara ini, pihak yang berada dalam kedudukan terbaik untuk menjelaskan pengataan oleh BV dan yang merupakan pihak yang telah melaksanakan kerja untuk plaintif-plaintif dan memiliki semua rekod dan dokumen kerja, adalah defendan (lihat perenggan 9).

F (2) Adalah ditekankan juga di bawah perenggan 11 pembelaan TBV dalam tindakan D3, TBV menegaskan antara lain bahawa jika plaintif-plaintif gagal untuk memperoleh bantuan TBV untuk membela tuntutan yang dimulakan oleh defendan, TBV tidak wajib untuk membuat bayaran G kepada plaintif-plaintif untuk apa-apa award atau penghakiman yang defendan mungkin peroleh daripada plaintif-plaintif. Berhubung perkara ini kecuali plaintif-plaintif boleh memasukkan defendan sebagai pihak kepada tindakan D3. atau dapat menggabungkan tindakannya terhadap TBV, plaintif-plaintif akan diprejudiskan (lihat H perenggan 11).

(3) Tiada peruntukan di bawah Akta Timbangtara 1952 untuk plaintif-plaintif bergabung dengan TBV dan/atau pengarah-pengarah TBV (defendan-defendan dalam tindakan D3) sebagai perlindungan terhadap tuntutan defendan-defendan terhadap plaintif-plaintif I di bawah sub-subkontrak. Perbicaraan tuntutan defendan-defendan di bawah sub-subkontrak terhadap plaintif-plaintif dalam prosiding timbangtara akan menyebabkan plaintif-plaintif terkilan hak mereka untuk memulakan prosiding pihak ketiga terhadap TBV dan/atau pengarah-pengarah TBV untuk melindungi mereka (plaintif-plaintif)

terhadap tuntutan defendan-defendan terhadap plaintif-plaintif di bawah sub-subkontrak. Perbicaraan tuntutan defendan di bawah sub-subkontrak terhadap plaintif-plaintif dalam prosiding timbangtara akan menyebabkan prosiding yang berganda. Pertikaian antara plaintif-plaintif dan defendan adalah sama ada plaintif-plaintif berhutang kepada defendan apa-apa jumlah wang dan jika ada, jumlahnya. Pertikaian ini pada hakikatnya membentuk keseluruhan pertikaian antara plaintif-plaintif dan TBV (lihat perenggan 14).

(4) Sub-subkontraktor tidak boleh diasingkan sebagai pengantara plaintif-plaintif dan defendan dan terkecuali sebagai pihak lain, terutamanya, TBV. Sub-subkontraktor perlu sewajarnya menjadi subjek kepada sub-kontrak antara plaintif-plaintif dan TBV. Oleh itu plaintif-plaintif dijustifikasikan dengan menggunakan peruntukan A 4 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 15).

(5) Pada 25 Mac 2005, TBV (defendan dalam tindakan D3) telah memfailkan satu permohonan untuk menggantungkan prosiding dalam tindakan D3 di bawah s 6 Akta Timbangtara 1952 ('permohonan penggantungan'). Dalam permohonan penggantungan tersebut, TBV bergantung kepada fasal 40 sub-kontrak yang dimasuki antara plaintif-plaintif dan TBV yang memperuntukkan rujukan pertikaian dan perbezaan antara plaintif-plaintif dan TBV kepada timbangtara. Fasal-fasal 40 dan 41 dalam sub-kontrak antara plaintif-plaintif dan TBV adalah sama kepada fasal-fasal 40 dan 41 dalam sub-subkontrak antara plaintif-plaintif dan defendan dalam saman pemula. Dalam tindakan D3, Mahkamah Tinggi telah pada 17 Ogos 2005 menolak permohonan oleh TBV untuk penggantungan prosiding. Dalam keadaan sedemikian pertikaian antara plaintif-plaintif dan TBV di bawah sub-kontrak dan/atau pertikaian antara plaintif-plaintif dan TBV dan pengarah-pengarah TBV di bawah perjanjian penyelesaian tersebut akan diselesaikan dalam perbicaraan di hadapan Mahkamah Tinggi dalam tindakan D3 (lihat perenggan 16).

(6) Fasal-fasal biasa 40 dan 41 sub-kontrak dan sub-subkontrak apabila dibaca secara keseluruhan dan dalam pembentukan sebenar menunjukkan bahawa di bawah fasal 41 setiap sub-subkontrak, mahkamah mempunyai bidang kuasa eksklusif untuk mendengar dan menentukan semua tindakan dan prosiding yang timbul daripada sub-subkontrak tersebut. Peruntukan fasal 40 berkaitan timbangtara dalam sub-subkontrak yang berkaitan bercanggah dan tidak konsisten dengan fasal 41 setiap sub-subkontrak tersebut, sehinggakan mahkamah tidak patut menguatkuasakannya. Pertikaian sebegini yang timbul antara pihak-pihak sewajarnya diputuskan oleh mahkamah (lihat perenggan 17).]

Notes

For cases on joinder of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5042–5075.

For cases on jurisdiction of court, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1204–1217.

For cases on step in proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1476.

Legislation referred to

Arbitration Act 1952 s 6

Rules of the High Court 1980 O 4 r 1(1)

Appeal from: Originating Summons No D3–24–50 of 2005 (High Court, Kuala Lumpur)

SK Ganesan (Philip Choong & Co) for the appellants.

James Monteiro (Shirleena Jogeswaran with him) (Zaid Ibrahim & Co) for the respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] The plaintiffs filed an originating summons dated 16 February 2005 seeking inter alia, a declaration that: (i) any dispute between the plaintiffs and the defendant in respect of the sub-subcontracts should be dealt with by the Courts of Malaysia; and (ii) the appointment of the arbitrators by the defendant pursuant to cl 40 of the sub-subcontracts is invalid. The plaintiffs' originating summons was heard and dismissed by the learned judge of the High Court on 16 January 2006. The plaintiffs filed the notice of appeal dated 8 February 2006 against the said decision.

[2] After the final disposal of the originating summons, the plaintiffs filed an application for Erinford injunction before the High Court seeking a further order that the defendant be restrained from proceeding with the arbitration proceedings initiated by the defendant pending the plaintiffs' appeal to the Court of Appeal. This application for an Erinford injunction was dismissed by the High Court on 13 July 2006. Thereafter, the plaintiffs filed a notice of motion dated 3 August 2006 before the Court of Appeal seeking for the second time an Erinford injunction to restrain the defendant from proceeding with the arbitration proceedings to determine a dispute between the plaintiffs and the defendant pending the plaintiffs' appeal. When this notice of motion came before us for hearing, we directed the parties that we would proceed to hear straight away the plaintiffs' appeal

against the decision of the High Court in dismissing the plaintiffs' originating summons dated 16 February 2005 since the relevant records of appeal had already been filed before the court.

[3] The relevant background facts of the case are as follows:

(1) TBV Power (Malaysia) Sdn Bhd ('TBV') is a company incorporated in Malaysia and was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (Units 5 and 6) located in the vicinity of Kapar for Tenaga Nasional Berhad ('the project') and comprising 2 x 500 MW turbine generator units complete with all auxiliary equipment and materials ('the main contract works').

(2) In line with the appointment of TBV as the contractor for the project, the plaintiffs and TBV entered into two sub-contracts both dated 20 September 1996 whereby the plaintiffs agreed to design, fabricate and deliver low pressure fabricated pipe (the sub-contract for low pressure fabricated pipe) and low pressure pipe supports (the sub-contract for low pressure pipe supports) for the project in accordance with the conditions and specifications set out in Section IV of the sub-contracts for the sum of RM5,890,855.09 and RM1,458,144.92 respectively ('the sub-contracts').

(3) Thereafter, the plaintiffs and the defendant entered into two sub-subcontracts issued on 22 January 1997 and 29 January 1997, whereby the defendant agreed to design, fabricate and deliver low pressure fabricated pipe (the sub-subcontract for low pressure fabricated pipe) and low pressure pipe Supports (the sub-subcontract for low pressure pipe supports) for the Project in accordance with the conditions and specifications set out in Section IV of the sub-subcontracts for the sum of RM5,610,300 and RM1,388,700 respectively ('the sub-subcontracts')

(4) A dispute arose between the plaintiffs and the defendant in respect of the sub-subcontracts and the defendant referred the dispute to arbitration pursuant to the terms of the sub-subcontracts.

(5) The plaintiffs and TBV entered into a settlement agreement ('the settlement agreement') in respect of the sums due under the sub-contracts entered into between the plaintiffs and TBV. There subsequently arose a dispute in regard to the settlement agreement in respect of which the plaintiffs initiated Civil Suit No D3–22–66–2005 ('the D3 action') against TBV. The defendant is not a party to the settlement agreement.

A CONTENTION OF THE PLAINTIFFS

[4] It is the contention of the plaintiffs that the dispute between the plaintiffs and the defendant should not be referred to arbitration as there is a conflict between the provisions of cl 40 and cl 41 of the sub-subcontracts which result in the courts of Malaysia having exclusive jurisdiction to hear and determine all actions arising from the sub-subcontracts. The plaintiffs further contended that the agreement entered into between the plaintiffs and TBV, a third party precludes the defendant from exercising its contractual rights to refer the dispute between the plaintiffs and the defendant to arbitration. The plaintiffs also contended that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and TBV, the third party.

CONTENTION OF THE DEFENDANT

[5] It is the defendant's contention on the other hand that the dispute between the plaintiffs and the defendant should be referred to arbitration. The unequivocal terms of the sub-subcontracts that are valid and binding on the parties expressly provide that any dispute arising thereunder is to be referred to arbitration. It is clear, upon a proper construction and interpretation, that cl 40 and cl 41 of the sub-subcontracts are not inconsistent or contradictory with each other. The defendant also challenged the basis of the plaintiffs' contention that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and the third party. To the defendant, any agreement between the plaintiffs and the third party does not bind the defendant or affect the contractual terms of the sub-subcontracts which allow any dispute between the plaintiffs and the defendant to be referred to arbitration. In the circumstances of the case the defendant therefore contended that the reference of the dispute between the plaintiffs and the defendant to arbitration and the appointment of the arbitrators are valid.

DECISION OF THE COURT ON APPEAL

[6] We have to state at the outset we noted that all the contract documents in the sub-contracts (between the plaintiffs and TBV) and in the sub-subcontracts (between the plaintiffs and the defendant) are identical in all material particulars. The works undertaken by the defendant as the sub-subcontractors of the plaintiffs are the same works carried out by the plaintiffs for TBV under the sub-contracts. In the event the plaintiffs are held liable to the defendant under the sub-subcontracts, TBV ought to indemnify the plaintiffs against all claims by the defendant under the said sub-subcontracts.

[7] It is to be noted that at around the same time two claims in relation to the dispute surrounding the parties had been filed. In the first claim, the plaintiffs have instituted a claim against TBV and its directors in the D3 action. In the second claim, the defendant's arbitration claim against the plaintiffs (under the sub-subcontracts) is based on works carried out by the defendant under the sub-subcontract on behalf of the plaintiffs in order to fulfill the plaintiffs' obligation under the sub-contracts entered into with TBV.

[8] It is necessary that we reproduce here the relevant common cll 40, 41 and 47 under the provisions of the sub-contracts and the sub-subcontracts entered into by the respective parties as follows:

GC.40 — Arbitration

40(i) If at any time any question, or difference shall arise between the sub-contractor and the sub-subcontractor, either party shall, as soon as reasonably practicable, give to the other notice in writing of the existence of such question dispute, or difference, specifying its nature and the point at issue, and the same shall be referred to the arbitration of a person to be agreed upon or failing such agreement within six weeks, to some person appointed on the application of either of the parties to the Contract by the President for the time being of the Institution of Engineers (Malaysia). Any such reference shall be deemed to be as submission to Arbitration under the provision of the Arbitration Act Malaysia 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force. The award of the Arbitration shall be final and binding on the parties. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the Arbitration, who may determine the amount thereof or the basis upon which the same shall be ascertained.

40(H) Performance of the Contract shall continue during arbitration proceeding unless the Subcontractor shall order the suspension thereof or of any part thereof and if any such suspension shall be ordered the reasonable expenses of the sub-subcontractor occasioned by such suspension shall be added to the Contract Price.

GC.41 — Arbitration

41 (i) The Contract shall be governed and construed according to Malaysian Law and the Courts of Malaysia shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the sub-subcontractor hereby submits to thejurisdiction of the Courts in Malaysia, for the purpose of all such actions and proceedings.

41(ii) The sub-subcontractor binds himself to acknowledge and accepts as final in all respects within the country of domicile of the sub-subcontractor or elsewhere any decision or award of an arbitrator or judgment in any court in Malaysia in relation to any dispute between the parties under the Contract whether in respect

of payments to be made hereunder or in other matters. This undertaking is valid in all respects in case any such decision, award or judgment is to be enforced in the courts of the country of domicile of the sub-subcontractor or elsewhere in any manner.

GC.47 — Indemnification

To the fullest extent permitted by laws and regulations, the sub-subcontractor shall defend, indemnify, and hold harmless purchaser, engineer, contractor and subcontractor and their officers, directors, partners, consultants, agents and employees from and against all claims, damages, losses, and expenses, direct, indirect, or consequential (including but no limited to fees and charges of engineers, architects, attorneys, and other professionals and court and arbitration costs) arising out of or resulting from the performance of the work by the sub-subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by laws and regulations regardless of the negligence of any such party. In any and all claims against purchaser, engineer, contractor or subcontractor or any of their officers, directors, partners, consultants, agents, or employees by any employee of the sub-subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, this indemnification obligation shall not be limited in any limitation on the amount or type of damages, compensation, or benefits payable by or for the sub-subcontractor or any other person or organization under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts, nor shall this indemnification obligation be limited in any way by any limitation on the amount or type of insurance coverage provided by the purchaser, the contractor, the subcontractor, or the sub-subcontractor.

[9] In view of the above, we therefore find there are common issues of law and fact involving the three parties, namely the plaintiffs, the defendant and TBV that need to be resolved. It is our considered view that the plaintiffs ought to bring in the defendant into the D3 action to indemnify themselves. In the D3 action instituted by the plaintiffs against TBV, it is the contention of TBV as pleaded under para 7 of its defence that the plaintiffs had failed to take the necessary steps to comply with the terms of the contract (the sub-contracts) and that the plaintiffs failed to supervise the progress of works carried out by the sub-subcontractors to ensure that the works were completed by the sub-subcontractors within the agreed stipulated period. By reason of the plaintiffs' failure, TBV has alleged that it had suffered loss and damage. On this point, we are of the view the party who would be in the best position to explain these allegations by TBV and being the party who did the works for the plaintiffs and possessed all the relevant records and documents of the same, would be the defendant.

[10] In view of the above, we therefore find there are common issues of law and fact involving the three parties, namely the plaintiffs, the defendant and TBV that need to be resolved. It is our considered view that the plaintiffs ought to bring in the defendant into the D3 Action to indemnify themselves. In the D3 Action instituted by the plaintiffs against TBV, it is the contention of TBV as pleaded under para 7 of its defence that the plaintiffs had failed to take the necessary steps to comply with the terms of the contract (the sub-contracts) and that the plaintiffs failed to supervise the progress of works carried out by the sub-subcontractors to ensure that the works were completed by the sub-subcontractors within the agreed stipulated period. By reason of the plaintiffs' failure, TBV has alleged that it had suffered loss and damage. On this point, we are of the view the party who would be in the best position to explain these allegations by TBV and being the party who did the works for the plaintiffs and possessed all the relevant records and documents of the same, would be the defendant.

[11] It is noted also under para 11 of the defence of TBV in the D3 action, TBV contended inter alia that if the plaintiffs failed to obtain the assistance of TBV to defend the claim instituted by the defendant, TBV would not be obliged to make payments to the plaintiffs for any award or judgment which the defendant herein may obtain against the plaintiffs. On this point we are of the view unless the plaintiffs can bring the defendant as a party to the D3 action, or manages to consolidate its action with the action against TBV, the plaintiffs would be prejudiced.

[12] As regards the defendant's agreement to indemnify the plaintiffs for 'works' done, we are of the view that the defendant is aware of this link, and has acknowledged it in the sub-subcontracts, as can be seen at Form A of the Form of Agreements at pp 361 and 437 of the sub-subcontracts. Form A reads as follows:

> In consideration of the payment to be made by the subcontractor to the sub-subcontractor as hereinafter mentioned the sub-subcontractor hereby convenants with the subcontractor that the sub-subcontractor shall and will duly provide, deliver including technical supervision as required, the works and shall do and perform all other acts and things in the contract mentioned or described or to be implied therefrom or may reasonably be necessary for the completion of the said works within and at the times and in the manner and subject to the terms and conditions mentioned herein and so as *to enable the subcontractor to comply with and satisfy the provisions and requirements of the main contract and the sub-subcontractor hereby indemnifies the subcontractor from and against all or any claims, damages, losses, and expenses (both direct and indirect) incurred by the subcontractors as a result of any such breach by the sub-subcontractor.*
>
> (Emphasis added.)

[13] It is further noted pursuant to cl 47, the defendant is to indemnify inter alia the plaintiffs ('sub-contractor') and TBV ('contractor') from and against all claims, damages, losses and expenses, direct, indirect, or consequential arising out of or resulting from the performance of the work by the sub-subcontractor (ie the defendant), any person or organization directly or indirectly employed by any of them.

[14] We find there is no provision under the Arbitration Act 1952 for the plaintiffs to join TBV and/or the directors of TBV (the defendants in the D3 action) for an indemnity against the defendants' claim against the plaintiffs under the sub-subcontracts. The hearing of the defendants' claim under the sub-subcontracts against the plaintiffs in the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV and/or the directors of TBV to indemnify them (the plaintiffs) against the defendants' claim against the plaintiffs under the sub-subcontracts. We are of the considered view that the hearing of the defendant's claim under the sub-subcontracts against the plaintiffs in the arbitration proceedings would result in duplicity of proceedings. The dispute between the plaintiffs and the defendant is whether the plaintiffs owe the defendant any sums of money and if so, the amount. This dispute is in fact an integral part of the dispute between the plaintiffs and TBV.

[15] It is our judgment that the sub-subcontracts cannot be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular, TBV. The sub-subcontracts must necessarily be subject to the sub-contracts between the plaintiffs and TBV. It is for this reason that we find the plaintiffs are justified in invoking the provision of O 4 r 1(1) of the Rules of the High Court 1980, in aid of its cause and which states as follows:

> Where two or more causes or matters are pending, then, if it appears to the court:
>
> (a) that some common question of law or fact arises in both or all of them;
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule,
>
> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[16] We would also like to state here that on 25 March 2005, TBV [the defendant in the D3 action] filed an application for stay of proceedings in the D3 Action under s 6 of the Arbitration Act 1952 ('application for stay'). In the application for stay, TBV relied on cl 40 of the sub-contracts entered into between the plaintiffs and TBV [the defendant in the D3 Action] which provided for reference of disputes and differences between the plaintiffs and TBV to arbitration. Clauses 40 and 41 in the sub-contracts between the plaintiffs and TBV [the defendant in the D3 action] are identical to cll 40 and 41 in the sub-subcontracts between the plaintiffs and the defendant in the originating summons herein. In the D3 action, the learned Judge of the High Court had on 17 August 2005 dismissed the application by TBV for stay of proceedings. In the circumstances the dispute between the plaintiffs and TBV under the sub-contracts and/or the disputes between the plaintiffs and TBV and the directors of TBV under the settlement agreement would be resolved in a trial before the High Court in the D3 action.

[17] It is our judgment the common cll 40 and 41 of the sub-contracts and the sub-subcontracts when read as a whole and in their proper construction would show that under the said cl 41 of each of the sub-subcontracts it is the court which has the exclusive jurisdiction to hear and determine all actions and proceedings which arise out of the sub-subcontracts. The provision of cl 40 relating to arbitration in the relevant sub-subcontract contradicts and is inconsistent with the said cl 41 of each of the sub-subcontract, so much so that the court ought not give effect to the same. Such disputes as exist between the parties should be decided by the court.

CONCLUSION

[18] For the reasons already stated we would allow the appeal by the plaintiffs and set aside the orders of the High Court dated 16 January 2006. We would instead make an order in terms of the declaration as prayed for in the plaintiffs' originating summons dated 16 February 2005. There will be no order as to costs here and in the court below. Deposit paid is to be refunded to the plaintiffs.

Appeal allowed.

Reported by Loo Lai Mee